No. 14-844

In the Supreme Court of the United States

ANTOINE BRUCE, PETITIONER

v.

CHARLES E. SAMUELS, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 19 OTHER STATES IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Under the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66, when an *in forma pauperis* prisoner files a civil lawsuit or an appeal in federal court and cannot pay the full filing fees, he generally must make an initial partial payment, 28 U.S.C. § 1915(b)(1), and then must pay the rest of the filing fees by "mak[ing] monthly payments of 20 percent of the preceding month's income credited to [his] account" (so long as his account contains more than $10), 28 U.S.C. § 1915(b)(2). The question presented is:

Whether, when an *in forma pauperis* prisoner has filed more than one federal lawsuit or appeal, his monthly payment is 20 percent of his monthly income regardless of how many cases he has filed or instead is 20 percent of his monthly income for each case that he has filed.

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INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

The vast majority of prisoners incarcerated in the United States reside in state prisons: out of the 1,561,525 total prisoners in the United States, 1,350,958 reside in state prison. Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014*, Table 2 (Sept. 2015). The *Amici* States, and the Attorneys General who serve as their chief law-enforcement officers, thus have a direct and concrete interest in the proper interpretation and application of the Prison Litigation Reform Act. That interest includes enforcing the statute's provisions regarding costs so that (as a majority of circuits have held) a prisoner bears a marginal cost for *each* action or appeal he files, rather than being allowed "a free ride after they file their first piece of litigation. *Torres* v. *O'Quinn*, 612 F.3d 237, 256 (4th Cir. 2010) (Niemeyer, J., dissenting).

Section 1915(b) imposes costs and requires payment for *each* litigation stage a prisoner chooses to enter. Subsection (b)(1) requires that initial partial payments be made both when an action is filed and when an appeal is filed, and this shows that Congress intended to require prisoners to pay costs on multiple filings at the same time. Indeed, applying the text to the paradigm prisoner case (which consists of a filing, a dismissal of the action, and then an appeal) requires *simultaneous* payments by a single prisoner: an *initial* payment on appeal at the same time as a *monthly* payment on the district-court action. This demonstrates that Congress's intent was not to adopt a per-prisoner collection approach, but rather a per-litigation-stage approach.

None of the petitioner's arguments overcome this point. While he relies heavily on the argument that Congress intended a single court to collect multiple fees, a neighboring statutory provision addressing fees shows that Congress expected multiple fees to be owed to a single court simply from filing a complaint. § 1914(a) (imposing a $350 filing fee); § 1914(b) (allowing for additional fees, via a fee schedule).

Nor is there any constitutional problem to be avoided by applying a per-litigation-stage approach, because there is a safety valve: § 1915(b)(4) allows even a prisoner who has 100% of his income dedicated to prior filings to file a new action or appeal anyway, without paying an initial partial fee. And in any event, *in forma pauperis* status is generally a statutory privilege, not a constitutional right; because Congress created the privileged status in the first place, it can impose sensible limits on that privilege so that it does not subsidize an unlimited number of filings.

In the end, not only do the text and context of § 1915 demonstrate that costs should be collected simultaneously for each litigation stage, that approach also furthers Congress's purpose of deterring excessive litigation by requiring prisoners to bear some cost each time they file an action or an appeal. In contrast, adopting a per-prisoner approach would greatly reduce the statute's deterrent effect after the first filing. And the per-litigation-stage approach is readily manageable by the States.

ARGUMENT

I. Both text and context show that § 1915(b) imposes filing fees at specific litigation stages and requires their payment on the same basis.

Outside the prison context, if a litigant is granted leave to file *in forma pauperis*, then his filing fees are forgiven. BLACK'S LAW DICTIONARY 794 (8th ed. 2004) (defining "in forma pauperis" as "[i]n the manner of an indigent who is permitted to disregard filing fees and court costs"). This forgiveness of fees did not exist in the federal courts for the first century of our Nation's history; instead, the First Congress imposed filing fees on all plaintiffs. *Lewis* v. *Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002). Congress did not create the statutory privilege of *in forma pauperis* status until 1892. *Id.*

In the Prison Litigation Reform Act, Congress chose not to extend the privilege of fee forgiveness to prisoners. Instead, for prisoners pauper status means that the fees are paid in installments, not forgiven: "if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1).

This different approach stems from Congress's recognition that prisoners who have no income are not indigent in the same way that an ordinary American might be. "Unlike other prospective litigants who seek poor person status, prisoners have all the necessities of life supplied, including the materials required to bring their lawsuits." 141 Cong. Rec. S7526 (May 25, 1995) (statement of Sen. Kyle).

With the necessities of life supplied them, prisoners have different incentives from the general public. "Congress recognized that 'a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.' " *Denton* v. *Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989)). The PLRA thus was designed to require a prisoner to bear some costs for litigation activity to give prisoners an incentive to file only meritorious claims: "The filing fee is small enough not to deter a prisoner with a meritorious claim, yet large enough to deter frivolous claims *and multiple filings*." 141 Cong. Rec. S7526 (May 25, 1995) (emphasis added).

A. Section 1915(b) imposes payments on a per-litigation-stage basis.

Section 1915(b) requires a prisoner to pay the full filing fee for each stage of litigation he chooses to pursue: "the prisoner shall be required to pay the full amount of a filing fee" "if a prisoner [1] brings a civil action or [2] files an appeal in forma pauperis." § 1915(b)(1). This means a prisoner who brings an action and then files an appeal in the same case must pay two fees: the full district-court filing fee *and* the full appellate-court filing fee. This is consistent with the fact that the statute expressly and consistently focuses not on a "case" as a whole, but on the litigation stages at which filing fees are incurred: "The *in forma pauperis* statute repeatedly treats the trial and appellate stages of litigation as distinct." *Coleman* v. *Tollefson*, 135 S. Ct. 1759, 1763 (2015) (citing §1915(a)(2),(a)(3), (b)(1), (e)(2), & (g)). There is thus no per-prisoner approach for imposing the full filing fee.

Not only must a prisoner eventually pay the full filing fee incurred for each litigation stage, he also must pay the initial partial filing fee up front, at the time he enters a particular stage of litigation. The statute provides that a prisoner who qualifies for pauper status must pay "an initial partial filing fee of 20 percent" of the average monthly deposits or monthly balance (whichever is greater) whether he is filing a "complaint" or a "notice of appeal." § 1915(b)(1). This initial partial *filing* fee is due, as its name suggests, when "the complaint or notice of appeal" is filed. § 1915(b)(1); see also § 1914(a); accord Pet. Br. 3 ("A first, partial payment comes at the time of the commencement of the case or docketing of an appeal."). In short, the initial partial payment is triggered, as one would expect, by the commencement of a new litigation stage—by the filing of a complaint *or* by the filing of an appeal. Thus, the initial partial fee, like the obligation to pay the full fee, also applies on a per-litigation-stage basis, not on a per-prisoner basis. Indeed, the petitioner concedes that " 'the initial partial filing fee accrues in each case, regardless of the number of suits initiated,' " Pet. Br. 17—in other words, not on a per-prisoner basis.

The fact that the statute focuses on litigation stages is a simple point, but one worth emphasizing, because it shows that Congress affirmatively contemplated that a single prisoner would have to pay multiple filing fees at the same time (i.e., simultaneously) if he engaged in multiple filings: he would have to pay an *initial* partial fee for his *appeal* at the same time he was making *monthly* payments for his civil *action*. E.g., *Newlin* v. *Helman*, 123 F.3d 429, 436 (7th Cir. 1997), overruled in part on other grounds by *Lee*

v. *Clinton*, 209 F.3d 1025 (7th Cir. 2000), and *Walker* v. *O'Brien*, 216 F.3d 626 (7th Cir. 2000) ("Just as we concluded that the complaint and the appeal can produce two strikes in a single case, so we hold that the fees for filing the complaint and appeal cumulate.").

Consider, for example, how the statutory text applies to the paradigm case of a prisoner suit: a prisoner files a civil action, has it dismissed, and then appeals the dismissal. The prisoner files a complaint in a district court (say, the Western District of Michigan). Subsection (b)(1) directs "the court" to assess and "collect, as a partial payment of any court fees required by law, the initial partial filing fee." The immediately preceding section of the U.S. Code specifies *which* court is "the court" that must undertake that collection: "The clerk of each district court shall require the parties instituting any civil action, suit or proceeding *in such court* to pay a filing fee." § 1914(a) (emphasis added). And § 1914 also reveals why Congress in § 1915(b)(1) might have referred to multiple "fees [plural] required by law" at this initial stage: § 1914(a) imposes a $350 filing fee, and § 1914(b) provides that "additional fees" may be "prescribed by the Judicial Conference of the United States." See § 1914 note (1995) (District Court Miscellaneous Fee Schedule) (setting fees, some of which may apply at filing). The commencement of the district-court action thus triggers an initial payment due to the Western District of Michigan. § 1915(b)(1).

As the suit progresses, the prisoner must make "monthly payments of 20 percent of the preceding month's income credited to [his] account."

§ 1915(b)(2). The monthly-payments provision in subsection (b)(2) also refers to the same court: it directs the agency with custody of the prisoner to forward monthly payments for the already incurred filing fee "to the clerk of the court"—i.e., in this hypothetical, the Western District of Michigan.

Now assume that the prisoner's action is dismissed after several months for failing to state a claim and that the prisoner appeals. See § 1915A (requiring screening of prisoner complaints); see also 141 Cong. Rec. S7526 ("Most prisoner lawsuits are meritless."); *Jones* v. *Bock*, 549 U.S. 199, 203 (2007) ("Most of these cases have no merit; many are frivolous."). Once the prisoner "files *an appeal* in forma pauperis," he must pay "an initial partial filing fee" for commencing that new litigation stage. § 1915(b)(1) (emphasis added). This appellate fee must also be paid to the same district court (in this hypothetical, the Western District of Michigan)—and it too consists of multiple court fees. § 1913 (appellate fees prescribed "by the Judicial Conference of the United States"); http://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule (listing fees, including a $500 fee for filing a notice of appeal); § 1917 (a $5 fee upon filing a notice of appeal "shall be paid to the clerk of the district court").

The prisoner thus must make an *initial* payment of 20% of his average income or balance for the *appellate* filing, § 1915(b)(1), while at the same time he must simultaneously make a *monthly* payment of 20% of his income for his prior *district-court* filing, § 1915(b)(2). The paradigm case—where a prisoner files a civil action, has it dismissed, and then appeals

it—thus requires, under § 1915(b)'s plain language, that the prisoner simultaneously pay 40% of his income toward those two filing fees, not just 20%. And then the prisoner must make ongoing monthly payments "until the filing fees are paid," which by this point could include the fees set out in § 1914(a) and § 1914(b) for the district court and the fees set out in § 1913 and § 1917 for the appellate court. § 1915(b)(2). Applying the plain language to the paradigm case confirms that § 1915(b) as a whole takes a per-case (or, more precisely, a per-litigation-stage) approach, not a per-prisoner approach.

B. The petitioner's arguments about the text of § 1915(b)(2) do not justify a per-prisoner approach.

Against this, the petitioner contends that "Congress's use of the singular 'clerk of the court,' but the plural 'filing fees,' evinces that a single clerk's office is to receive monthly payments even when there are numerous 'filing fees' owed, which is consistent with the per-prisoner approach but not the per-case approach." Pet. Br. 12. But there is no inconsistency: multiple filing fees for a given litigation stage may be owed to a single court. The petitioner assumes there could only be one filing fee per case (and so a reference to multiple filing fees must refer to multiple cases), but that assumption is inconsistent with multiple filing fees imposed by § 1914(a) and (b) for one action and by § 1913 and § 1917 for one appeal. And the ordinary progression of a case through the trial and appellate stages also results in multiple "filing fees."

Consistent with the petitioner's preferred approach, the Fourth Circuit held "that 28 U.S.C. § 1915(b)(2) caps the amount of funds that may be withdrawn from an inmate's trust account at a maximum of twenty percent *regardless of the number of cases or appeals the inmate has filed*." *Torres* v. *O'Quinn*, 612 F.3d 237, 252 (4th Cir. 2010). This holding cannot be reconciled with the fact that § 1915(b)'s plain text instructs courts to withdraw twice that much (40%) from an inmate's trust account in the ordinary situation where the prisoner files an appeal before having paid off his district-court filing fee—that is, while he is still making monthly payments on that fee. Thus, while the Fourth Circuit concluded that "the twenty percent exaction applies to *all* court fees, in total," *id.*, its reasoning is inconsistent with the archetypical case, where initial payments of 20% would be taken for *both* the action and the appeal. And the reason for the Fourth Circuit's error is simple: it overlooks the fact that the phrase "a partial payment for any court fees required by law" refers to the court fees required *in the civil action or appeal at issue* in that particular court. Pet. App. 16a ("Subsection (b)(1)'s reference to 'any' court fees, however, must be read in context: when a prisoner 'brings a civil action or files an appeal,' he must pay an initial filing fee and monthly installments thereafter as payment of any (and all) court fees *required for that action or appeal*.").

The Second Circuit, in *Whitfield* v. *Scully*, 241 F.3d 264 (2d Cir. 2001), made the same error that the Fourth Circuit did. It asked whether collection should proceed in a simultaneous fashion (under the per-case or "per-encumbrance" approach) or in a sequential

fashion (under the per-prisoner approach). *Id.* at 276. While it conceded that subsection (b)(2)'s monthly payment requirement "could plausibly be read to require recoupment on a per-encumbrance basis," *id.*, it adopted a per-prisoner approach to avoid the fact that "the simultaneous collection of multiple encumbrances could potentially expose 100 percent of a prisoner's income to recoupment." *Id.* But the paradigm case shows that Congress expected simultaneous recoupment of multiple fees, because a monthly payment on a district-court fee will almost always overlap with an initial payment on an appellate fee.

The Fourth Circuit also premised its adoption of a per-prisoner approach on the assumption that Congress had not even *thought* about the problem of how to collect fees when prisoners incur multiple filing fees. *Torres* v. *O'Quinn*, 612 F.3d 237, 245 (4th Cir. 2010) ("[W]e are called upon to determine what Congress would have done had it thought about the problem."). That is a heroic assumption, and it is contradicted by the fact that (to use the petitioner's words) "the entire purpose of the PLRA is to provide rules for prisoners who file multiple lawsuits." Pet. Br. 18. In fact, Congress was so concerned about the problem of individual prisoners filing multiple lawsuits using *in forma pauperis* status that it imposed in the PLRA a three-strikes rule to limit the number of abusive actions or appeals that a prisoner could bring. § 1915(g); see also *Coleman*, 135 S. Ct. at 1762. The three-strikes rule, after all, takes effect only after a prisoner has filed multiple actions or appeals. § 1915(g) ("on 3 or more prior occasions").

Given that both the full fee and the initial partial payment both expressly apply on a per-litigation-stage basis, there is no reason to interpret the monthly payment as somehow being capped on a per-prisoner basis. Subsection (b)(2) continues the process begun in subsection (b)(1) and extends it. Indeed, if Congress intended to switch from what even the petitioner agrees is a per-stage approach in subsection (b)(1), Pet. Br. 17; see also *Siluk* v. *Merwin*, 783 F.3d 421, 427 (3d Cir. 2015) ("This subsection [(b)(1)] unambiguously applies to each action or appeal that a prisoner files, whether or not the prisoner has filed other suits that are pending."), then one would expect Congress to provide some clear instruction that it was shifting gears to apply a different approach in subsection (b)(2) for monthly payments from its approach for initial payments. But instead, subsection (b)(2) begins with a direct link to subsection (b)(1), see § 1915(b)(2) ("After payment of the initial partial filing fee "), uses the same percentage (20%) that (b)(1) does, and then sensibly automates the process of monthly garnishment by directing the agency with custody of the prisoner to ensure the payments are being made until all of the filling fees are paid. "Nothing in the statute suggests that a second or third action should be treated any differently than the first." Pet. App. 16a. Nothing, in short, signals any intent to shift from requiring the payment of filing fees incurred in each given case to imposing a 20% cap on all filing fees, regardless of how many filings the prisoner has made.

C. The statute as a whole applies on a per-litigation-stage basis.

The broader context of § 1915 confirms that a per-litigation-stage approach applies. The subject-matter of § 1915 is filing fees, and, at the risk of belaboring the obvious, filing fees do not apply on a per-prisoner basis, but rather to litigation stages.

Just last Term, this Court recognized that § 1915's repeated references to "actions" and "appeals" were intended to separate out the stages of litigation: "The *in forma pauperis* statute repeatedly treats trial and appellate stages of litigation as distinct." *Coleman*, 135 S. Ct. at 1763. This Court cited five provisions illustrating this distinction:

- (a)(2), which requires a prisoner to submit a certified trust-fund-account statement whenever "seeking to bring a civil action or appeal a judgment in a civil action" *in forma pauperis*—that is, *each* time he files, not just once in a litigation career;

- (a)(3), which provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith," again a provision that applies to a specific appeal;

- (b)(1), which requires a prisoner to pay the full amount of a filing fee if he "brings a civil action or files an appeal in forma pauperis," and which also calculates the initial partial payment based on the six-month period

"immediately preceding the filing of the complaint or notice of appeal";

- (e)(2), which directs courts to dismiss if "the action or appeal" is frivolous, malicious, fails to state a claim, or seeks monetary relief against an immune defendant; and

- (g), which, in the three-strikes rule, bars prisoners from "bring[ing] a civil action or appeal[ing] a judgment in a civil action" *in forma pauperis* if the prisoner has had three or more "action[s] or appeal[s]" dismissed as frivolous, as malicious, or for failing to state a claim.

The Court could have cited more provisions, including subsections (b)(3), (b)(4), and (c). In a statute where Congress has repeatedly established triggers that depend on events that occur at a specific litigation stage (i.e., dismissals, statements that there is no good-faith basis to appeal, and full payments of filing fees), it makes little sense to think it would deviate from that framework without clearly signaling that it wanted a different framework for monthly payments.

The Third Circuit in *Siluk* v. *Merwin*, 783 F.3d 421 (3d Cir. 2015), argued that § 1915(g)'s three-strikes rule is an example of a per-prisoner approach and that it "does not address each case individually." *Id.* at 429. According to the Third Circuit, "[c]learly, Congress there intended to review a prisoner's *overall* litigation history, not merely one case at a time." *Id.* But while the *consequence* of losing the privilege of pauper status applies to a specific prisoner, the

triggering event of a qualifying dismissal does occur one case at a time. Indeed, the question this Court resolved in *Coleman* was whether a district-court dismissal counted as a strike on a per-case basis (i.e., only after affirmed on appeal) or on a per-litigation-stage basis (i.e., immediately upon the district court's dismissal). 135 S. Ct. at 1763 (recognizing it is the latter).

II. Applying § 1915(b)'s plain text does not raise any constitutional problems.

The circuits that have adopted a per-prisoner approach have asserted that applying a per-stage approach would cause constitutional problems by limiting prisoners' rights of access to the courts. E.g., *Whitfield*, 241 F.3d at 277 (expressing the concern that a per-encumbrance approach "could pose a serious constitutional quandary as to whether an unreasonable burden had been placed on the prisoner's right of meaningful access to the courts, especially with respect to the collection of filing fees"). But no such constitutional issue would arise.

First, § 1915(b)(4) provides that a prisoner cannot be precluded from filing an action or an appeal "for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." None of the circuits that has adopted a per-prisoner approach has any response to this point. In fact, both the Second Circuit in *Whitfield* and the Fourth Circuit majority in *Torres* fail to even *mention* subsection (b)(4). See generally *Whitfield*, 241 F.3d 264; *Torres*, 612 F.3d 237; see also *Torres*, 612 F.3d at 258 (Niemeyer, J., dissenting) ("the statute expressly guards against any access problem in § 1915(b)(4)"). And the Third Circuit

in *Siluk* contradicts itself by invoking the need to avoid constitutional questions about the right of access to the courts *after it had already acknowledged* that Congress included § 1915(b)(4) "to safeguard a prisoner's constitutional right of access to the courts." 783 F.3d at 430–31.

The petitioner, acknowledging the existence of subsection (b)(4), takes a different tack. He argues that even if prisoners are allowed to file when they have no income, forcing them to choose between retaining some "discretionary income" and filing fewer actions would "impermissibly burden the exercise of a constitutional right." Pet. Br. 45–46. But that choice is put to average Americans every day: "Requiring prisoners to make economic decisions about filing lawsuits does not deny access to the courts; it merely places the indigent prisoner in a position similar to that faced by those whose basic costs of living are not paid by the state." *Roller* v. *Gunn*, 107 F.3d 227, 233 (4th Cir. 1997). As the Fourth Circuit explained in *Roller*, "[t]hose living outside of prisons cannot file a lawsuit every time they suffer a real or imagined slight[;] [i]nstead, they must weigh the importance of redress before resorting to the legal system." *Id.* And that weighing is just what Congress wanted the PLRA to encourage.

On a related note, the existence of subsection (b)(4) also refutes the petitioner's assertion that Congress did not "provide[] guidance as to what happens once the fifth filing fee is incurred." Pet. Br. 13. If a prisoner has already promised 100% of his income to paying off filing fees (or other debts), Congress provided that he can still file, § 1915(b)(4),

and that he will still have to add his sixth filing fee to his overall debt, § 1915(b)(1) ("the prisoner shall be required to pay the full amount of a filing fee").

Second, even without § 1915(b)(4)'s safety valve, requiring the payment of a partial filing fee would not violate the Constitution. "[The] reason is simple: there is no constitutional entitlement to subsidy." *Lewis* v. *Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002) (noting that seven circuits have rejected constitutional objections to § 1915(g), which cuts off *in forma pauperis* access to courts, against challenges that included access challenges). Denying a prisoner *in forma pauperis* status, after all, "does not block a prisoner's access to the federal courts," but rather "only denies the prisoner the privilege of filing before he has acquired the necessary filing fee." *Abdul-Akbar* v. *McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc); see also *id.* at 316 ("The ability to proceed I.F.P is not a constitutional right. Congress granted the right to proceed I.F.P in 1892, and it has the power to limit this statutorily created right."); *White* v. *Colorado*, 157 F.3d 1226, 1233 (10th Cir. 1998) ("As the Eleventh Circuit observed, 'proceeding [*in forma pauperis*] in a civil case is a privilege, not a right—fundamental or otherwise.' ") (alteration in original).

To be sure, this Court has, in limited circumstances, held that an individual must be afforded pauper status. But as the Seventh Circuit has explained, "[t]he few proceedings in which civil litigants have been held entitled to a subsidy (via free counsel or waiver of fees) arise from prosecution-like proceedings, in which the public proposes to take away a person's children or impose other loss so great

that it amounts to deprivation of a fundamental right." *Lewis*, 279 F.3d at 529 (citing *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996), and *Boddie* v. *Connecticut*, 401 U.S. 371 (1971)). That concern could be addressed in a future case involving an as-applied challenge brought by a litigant actually confronted by such a deprivation.

III. Requiring payments for each litigation stage furthers the PLRA's purpose of making prisoners bear some of the cost of their filings.

When Congress passed the PLRA, it was trying to address the problem that prisoners will " 'litigate at the drop of a hat,' simply because they have little to lose and everything to gain." 141 Cong. Rec. S7524 (May 25, 1995) (statement of Sen. Dole). It wanted to fix the problem that there was "no economic disincentive to going to court." *Id.* at S7525. As Judge Easterbrook explained when addressing the question presented, "[t]he PLRA is designed to require the prisoner to bear some marginal cost for each legal activity." *Newlin*, 123 F.3d at 436.

Requiring prisoners to bear some cost for each filing is important, because prisoner litigation imposes substantial costs on the States. "[A]ll [States] have both low- and high-level personnel who spend significant portions of their time dealing with inmate litigation": "There are lawyers and paralegals in corrections departments and in offices of attorneys general; there are litigation officers, compliance officers, risk assessment personnel, and others." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1669 (2003). And prisoner litigation

imposes other costs: "systems that know they will be sued dozens or even hundreds of times each year develop practices that make responding to those lawsuits easier and more routine," such as "videoptap[ing] cell extractions." *Id.* at 1671.

Imposing fees on a per-litigation-stage approach serves the PLRA's goals better than imposing them only on a per-prisoner approach. As the Tenth Circuit put it, allowing "prisoners with one ongoing case to postpone all successive filing fee obligations" would "dilute[] if not defeat[]" the "overarching purpose of the statute," which is "to restrain runaway prison litigation with some pay-as-you-go constraint." *Christensen* v. *Big Horn Cnty. Bd. of Cnty. Comm'rs*, 374 F. App'x 821, 830 (10th Cir. 2010). As the D.C. Circuit explained in its decision below, "[c]apping monthly withdrawals at twenty percent of an inmate's income, regardless of the number of suits filed, would diminish the deterrent effect of the PLRA once a prisoner files his first action." Pet. App. 17a; see also *Torres*, 612 F.3d at 256 (Niemeyer, J., dissenting) ("This [per-prisoner approach] gives prisoners, in effect, a free ride after they file their first piece of litigation."); *Lefkowitz* v. *Citi-Equity Grp., Inc.*, 146 F.3d 609, 612 (8th Cir. 1998) ("Because the PLRA fee provisions were designed to require prisoners to bear financial responsibility for each action they take, the twenty-percent rule should be applied per case.").

IV. Applying a per-litigation-stage approach is administratively workable.

The petitioner also argues that the per-prisoner approach is preferable because a per-case approach would lead to situations where prisons must "send as

many as five checks for five different cases, possibly to five different courts." Pet. Br. 49. In these instances, he continues, the resources for "calculating, sending, receiving, and tracking five different payments" would not be worth the postage. *Id.* at 50.

But while tracking prisoner debts is complex (because prisoners may owe not just filing fees but also other debts such as child support and victim restitution), it can be handled in a manageable way. Michigan, for example, has developed a computer program that handles the calculation and tracking. See Mich. Dep't of Corrections, Policy Directive 04.02.107 ¶ E (discussing responsibilities "for ensuring that the Trust and Accounting Payroll System (TAPS) is maintained to allow for the accurate collection of funds from CFA prisoners pursuant to this policy and state and federal law"); see also Mich. Dep't of Corrections, Policy Directive 04.02.105 ("TAPS is designed to track activities as they relate to various prisoner accounts held in trust by the Department. It is a complete accounting system of prisoner funds, including credits, disbursements, and debts, with automatic collection from credits for debt collections."). Other States have similar tracking systems and well-developed processes for dealing with prisoner accounts and for properly prioritizing prisoner debts. E.g., Nev. Dep't of Corrections, Admin. Reg. 258, at 1 (July 9, 2015) (describing procedures to "provide for the receipt of all inmate funds, process deduction from inmate funds, and all other associated inmate banking services"); Ohio Admin. Code 5120-5-03 ("an individual account record shall be maintained for each inmate in an institution which reflects all receipts and disbursements of funds from each

account"); Kansas Dep't of Corrections, Internal Mgmt. Policy & Procedure 04-106A (addressing "procedures for the automated processing of offender fees"); 103 Mass. Code Regs. 405.07 ("All inmate funds in the possession of the Department of Correction shall be maintained on the Department of Correction's Inmate Management System Trust Fund Accounting Module."); 103 Mass. Code Regs. 405.18 (requiring entry of court-ordered payments into the Inmate Management System). And given that all parties agree both that initial partial payments must be made on a per-case basis and that each fee must ultimately be paid in full, the process of entering court orders and tracking payments must continue regardless of the outcome of this case.

As for the image of multiple checks being mailed that are not worth the postage it costs to send them, simple mechanisms avoid this concern. For example, corrections departments can include payments for multiple prisoners on a single check, with instructions allocating the funds to particular cases. Michigan, for example, processes checks by facility-level (i.e., the Alger Correctional Facility and the Ionia Correctional Facility address their particular prisoners), and the separate facilities transfer funds for roughly 10 to 20 prisoners on a given check (just as they would if they were applying a per-prisoner approach). In the end, the petitioner's account of the administrative difficulties that result from applying the plain text of the statute are overstated and well within the competence of the States to manage.

CONCLUSION

For these reasons, the Court should affirm the judgment of the D.C. Circuit.

Respectfully submitted,

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